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90-1942

NO. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

EDDIE SHIPP and GWENDOLYN BRANTLEY SHIPP,
Jointly and Severally,

Petitioners,

v.

ELIZABETH BYERLEIN, as Successor
in interest to her late husband,
ARTHUR BYERLEIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED

1. Whether the Federal Tax Lien was raised to senior lien status when Respondent foreclosed on the property without giving prior notice to the Internal Revenue Service pursuant to 26 U.S.C. 7425.

2. Whether subsequent foreclosure and TaxSale by the Internal Revenue Service extinguished Respondent's lien as a result of Respondent's failure to properly respond to notification pursuant to 26 U.S.C. 6335 and subsequent failure to bid at said sale or redeem thereafter pursuant to 26 U.S.C. 6337.

3. Whether the Michigan Court of Appeals erred in holding that Michigan law rather than Federal law controlled. the extinguishment or non-extinguishment of Respondent's mortgage lien.

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v.

ELIZABETH BYERLEIN, as Successor in interest to her late husband, ARTHUR BYERLEIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

Attorney DARWYN P. FAIR, on behalf on Eddie Shipp, and Gwendolyn Brantley Shipp, petitions for a writ of Certiorari to Review the Judgment of the Michigan Court of Appeals

OPINIONS BELOW

The opinion of the Court of Appeals on rehearing (Appendix A. infra, 1a-5a) is not reported. The opinion of the Court of Appeals on appeal (Appendix B, infra, 6a-9a) is not reported. The opinion of the Circuit Court for the County of Wayne (Appendix C, infra, 10a-11a) is not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, infra, at 9a) was entered on August 14, 1989. A petition for rehearing was granted on January 17, 1990 (Appendix D, infra, 12a). The Michigan Supreme Court denied application for leave to appeal on July 31, 1990 (Appendix E). The jurisdiction of this Court is invoked under 28 U.S.C. 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Supremacy Clause of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding. U.S. Constitution Article VI, clause 2.

2. Section 7425(a) of the Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 stat 1141, as amended by Pub. L. 194-455, 90 stat. 1834, as codified at 26 U.S.C. 7425(a) provides that:

> If the United States is not joined as a party, a judgment in any civil action ... or a judicial sale

pursuant to such a judgment, with respect to property on which the United States has or claims a lien...shall be made subject to and without disturbing the lien that has been filed...at the time such action or suit is commenced.

3. Section 7425(b) of the Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 stat. 1141, as amended by Pub. L. 94-455, 90 state 1834, as codified at 26 U.S.C. 7425(b) provides that:

> Where notice of a federal tax lien is duly filed more that thirty days prior to the date of the foreclosure sale, the sale will be made subject to the Federal lien unless written notice of the sale is served upon the United States at least twenty-five days before the sale.

4. Section 7425(c) of the Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 stat. 1141, as amended by Pub. L. 194-455, 90 state 1834, as codified at 26 U.S.C. 7425(c) provides that:

> Notice of a sale to which subsection (b) applies shall be given ... in writing ...not less than twenty-five days prior to such sale, to the Secretary.

5. Section 6331 of the Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 stat. 1135, as amended by Pub. L. 100-647, 102 state 3737, 3741, as codified at 26 U.S.C. 6331 provides that:

> The United States is authorized to collect delinquent taxes by levy upon all property and rights to property ... on which there is a lien provided in this chapter for the payment of such tax.

6. Section 6335(a) of the Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 stat. 1137, as amended by Pub. L. 100-647, 102 stat. 3740, as codified at 26 U.S.C. 6335(a) provides that:

> ...notice in writing shall be given by the secretary to the owner of the property...

7. Section 6337(a) of the Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 stat. 1137, as amended by Pub. L. 97-248, 96 stat. 639, as codified at 26 U.S.C. 6337(a) provides that:

> Any person whose property has been levied upon shall have the right to pay the amount due...any time prior to the sale thereof, and upon such payment the secretary shall restore such property to him...

8. Section 6337(b) of the Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 stat.

1137, as amended by Pub. L. 97-248, 96 stat. 639, as codified at 26 U.S.C. 6337(b) provides that:

> The owners of any real property sold as provided in section 6335 ... or any person having ... a lien thereon ... shall be permitted to redeem the property sold...at any time within 180 days after the sale thereof.

9. Section 6339(c) of the Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 stat. 1137, as amended by Pub. L. 94-455, 90 stat. 1834, as codified at 26 U.S.C. 6339(c) provides that:

> A certificate of sale...or a deed to real property executed pursuant to section 6338 shall discharge such property from all liens...over which the lien of the United States...had priority.

STATEMENT

1. In 1966, the Congress created the Federal Tax Lien Act to ensure prompt collection of revenues and to protect the United States, where its tax lien is junior to other liens, from discharge of the federal tax lien under state law without prior notice to the United States of proceedings by which the property is sold. The act precludes discharge of the Federal Tax Lien where a foreclosure sale is held by a senior lienholder who fails to join the United States as a party or fails to give notice of the foreclosure sale to the United States. Compliance with the notice provisions of Section 7425 of the Federal Tax Lien Act is mandatory where the United States has filed notice of its lien more than thirty days before such sale. The act further provides that if the United States is not joined or noticed in a foreclosure sale with respect to

property on which the United States has a valid lien such sale "shall be made subject to and without disturbing the lien of the United States". 26 U.S.C. 7425(a)(1) and 7425(b)(1).

Section 6331 of the Federal Tax Lien Act authorizes the United States to collect delinquent taxes "by levy upon all property and rights to property on which there is a lien provided in this chapter for the payment of such tax." 26 U.S.C. 6331(1). Section 6331(b) expressly includes "the power of distraint and seizure by any means "in the term levy and allows the United States to seize and sell the property levied upon. 26 U.S.C. 6331(b).

Section 6335 of the Federal Tax Lien Act provides that the United States must give notice of a tax foreclosure sale to all persons who claim an interest in the property to be foreclosed. 26 U.S.C. 6335. The United States gave proper notice of the

foreclosure sale to Respondent pursuant to Section 6335. However, Respondent failed to bid at foreclosure sale and thereby protect his interest in the foreclosed property.

Section 6337(a) of the Federal Tax Lien Act allows persons such as Respondent to redeem the property before the foreclosure sale by paying the taxes owed plus expenses. Section 6337(b) also allows such a person to redeem the foreclosed property within 180 days of sale by payment of the purchase price plus interest. Respondent failed to redeem the foreclosed property pursuant to either section 6337(a) or section 6337(b) and did not claim any irregularity in the foreclosure proceedings.

Petitioner purchased the property at the public auction conducted by the Internal Revenue Service in June of 1985. Section 6339 provides that a purchaser at a tax foreclosure sale takes title to the property subject to any liens with priority over the

Federal Tax Liens. Section 6339 further provides that all junior liens are discharged upon issuance of a certificate of sale.

2. On February 4, 1970, Respondent's late husband, Arthur Byerlein, held a recorded first mortgage on a parcel of property owned by Theodore and Celestine Graham. Between April 4, 1979 and May 16, 1985, the IRS filed and recorded several federal tax liens against the Grahams' interest in the subject property.

In June, 1983, Respondent sued to foreclose on his mortgage lien, not joining the IRS as a party and also failing to give the IRS actual notice of the foreclosure proceeding. On June 11, 1984, a judgment of foreclosure was entered in Respondent's favor. The foreclosure sale followed on November 20, 1984, at which time Respondent purchased the property for an amount slightly more than their lien interest. Respondent received a judicial deed which was recorded

on November 27, 1984, and subject to a six-month redemption period. The property was not redeemed and title vested in the Respondent on May 20, 1985.

On June 24, 1985, the IRS gave notice of a public auction, offering for sale the interest of the Grahams in the subject property. Respondent received written notice of the auction from the IRS by mail as evidenced by a copy of said notice attached to Respondent's complaint in the present action. The auction was held on July 22, 1985 and Petitioners purchased the interest in the prcperty and received a tax deed.

On July 6, 1987, Respondent sued to quiet title, and subsequently moved for summary disposition. A hearing was held on March 25, 1988, and Respondent's motion was granted. At that time the circuit court signed the motion praecipe. The Circuit Court entered a written order on June 20, 1988 expressly declaring Petitioners' tax

deed void and recognizing respondent as owner in fee simple.

On July, 11, 1988 Petitioners filed an appeal in the Michigan Court of Appeals. The Court of Appeals held that the Circuit Court erred as a matter of law in setting aside Petitioners' tax deed and also held that the United States tax lien was not extinguished as a result of Respondent's foreclosure sale. The Appeals Court reversed and remanded for entry of judgment quieting title in petitioners.

In 1989, Respondent sought a rehearing in the Michigan Court of Appeals. Upon rehearing, the Court of Appeals partially affirmed and partially reversed its earlier ruling. The Court of Appeals affirmed its ruling to the extent that it held that Petitioners held title to the property. However, the Court remanded for a determination of fact as to whether

Petitioners took title subject to a mortgage lien held by Respondent.

On February 7, 1990 Petitioners filed an application for Leave to Appeal in the Michigan Supreme Court. On July 31, 1990 the Michigan Supreme Court entered an order denying leave to appeal.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the enforcement of Federal Tax Liens and the quality of title received by a purchaser at a sale subsequent to foreclosure on a tax lien. The Michigan Court of Appeals has held that the federal tax foreclosure sale did not extinguish respondent's lien dispite Respondent's receipt of proper notification and Respondent's failure to protect his interest via redemption.

This erroneous ruling of the Michigan Court of Appeals seriously undermines the intent of Congress regarding collection of

taxes and enforcement of tax liens. The holding that Respondent's mortgage lien maintained priority over the federal tax lien after foreclosure by Respondent is inconsistent with Section 7425 of the Federal Tax Lien Act. In addition, the lower Federal Courts are inconsistent in their interpretations of the effect of a mortgagee's failure to join or notice the Internal Revenue Service pursuant to Section 7425. Review of the decision is necessary and essential to eliminate the inconsistencies.

1. In Southern Bank of Lauderdale County v. Internal Revenue Service, 770 F. 2d 1001 (11th Cir. 1985), Cert. denied 106 SCT 2890, the 11th Circuit held that "failure of the mortgagees to comply with the notice provisions of 26 U.S.C. 7425 before they conducted the foreclosure sales and purchased the property, caused their mortgage liens to be extinguished and the federal liens to be

elevated from their Junior status". Southern Bank, supra at 1009. The facts in Southern Bank are nearly identical to the facts in the instant case except that the mortgagee in Southern Bank attempted to foreclose a second time when it became aware that the first foreclosure was defective. The Southern Bank Court held that the mortgagee could not correct the defect by foreclosing a second time.

The Southern Bank court also pointed out that 26 U.S.C. 7425 outlines a two-step process that must occur before a mortgage foreclosure sale is made subject to a federal tax lien. "First, the United States must file its notice of lien thirty (30) days prior to the sale. Second, the United States must not be furnished with notice of sale in the time and manner prescribed by 26 U.S.C. 7425(c)(1)." Southern Bank, 770 F. 2d 1001 at 1005. Section 7425 (c)(1) requires service of written notice upon the Internal Revenue

Service twenty-five (25) days prior to the sale.

Respondent, as did the mortgagee in Southern Bank, failed to serve written notice at any time despite filing of the tax liens in compliance with Section 7425. The result of Respondent's failure to serve written notice was Respondent's purchase of the property at his own foreclosure sale subject to the Federal Tax Liens.

The Federal Courts that have considered the question have unanimously concluded that a foreclosure sale conducted in non-compliance with the notice requirements of Section 7425 is held subject to the Federal Tax liens. See U.S. v. State of Colorado, 872 F. 2d 338, 341 (10th Cir. 1989); Myers v. United States, 483 F. Supp. 1154 (1980).

However, the Courts differ as to the practical effect of a foreclosure sale "subject to the Federal Tax Liens." The differences are attributable to federal

Courts reliance on state law to determine the efficacy of a federal tax lien. That reliance on state law is inconsistent with the intent of Congress as expressed in the Federal Tax Lien Act. The Federal Tax Lien Act was enacted to protect the federal government's ability to collect taxes and enforce its liens. The act controls the effect of a federal tax lien under such facts as presented herein. "However, once the tax lien has attached to the taxpayer's state created interest, we enter the province of federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayer's property or rights to property, " Aquilino v. United States, 363 U.S. 509, 4 Led 2d 1365 at 1369, 805.ct.1277 (1960). "A federal tax lien is wholly a creature of federal law. Therefore, the consequences of the lien that attach to property interests are matters of federal law," U.S. v. Wingfield, 822 F. 2d

1466 (10th cir. 1987). "Of course, once it is determined that the taxpayer possesses property or rights to property recognizable under state law the federal tax consequences pertaining to such rights are solely a matter of federal law..." Little v. United States, 704 F. 2d 1100, 1105 (1983). "Matters directly affecting the nature or operation of such liens are federal questions, regardless of whether the federal statutory scheme specifically deals with them or not," Title Guaranty of Wyoming v. I.R.S., 667 F. Supp.. 767, 771 (D. Wyo. 1987).

Still, the lower Federal Courts have turned to state law in determining when a federal tax lien has priority over competing liens. This reliance on state law has been most pronounced where the Federal tax lien was originally junior to another lien created under state law. Under such circumstances where the senior lienholder has failed to undertake the proper procedures to discharge

the federal tax lien, the Courts have consistently determined that the federal lien continued to attach to the property interest. "Under these circumstances, Section 7425(b) dictates that the June 7 sale be considered subject to and without disturbing the tax liens, "Myers v. United States, 483 F. Supp. 1154 (1980).

The Courts have tended to apply the equitable doctrine of merger in determining when the senior lien is destroyed. Generally, the holdings take the position that the fee and the lien are merged where the lienholder has foreclosed and purchased at his own foreclosure sale." When a mortgagee forecloses on property, the doctrine of merger generally operates to extinguish the mortgage indebtedness and the lien held by the mortgagee," Southern Bank, supra at 1007, quoting Baldwin County Savings and Loan v. United States, 81-2 USTC 9619 at 88,065 (S.D. Ala. 1981). "... the Senior

liens were extinguished regardless of the senior lienors' intent." United States v. Polk, 822 F. 2d 871, 874 (9th Cir. 1987).

Here, Respondent foreclosed on his mortgage lien and subsequently purchased the fee at the foreclosure sale. Petitioners' argued that Respondent's mortgage lien was merged into the fee as a result of said purchase thereby extinguishing the mortgage lien. However, the Michigan Court of Appeals held that Respondent's mortgage lien merged into the fee only if that was Respondent's intent. The Michigan Court's holding is contrary to the intent of Congress expressed in the Section 7425 of the Federal Tax Lien Act. Such a holding nullifies the effectiveness of the federal tax lien contrary to the intent of Congress. "...We cannot permit states to nullify the effectiveness of the federal tax lien by enacting nonjudicial foreclosure laws or by applying various equitable principles

recognized by the state. The legislative history of 26 U.S.C. 7425 makes clear that Congress did not intend such a result," Southern Bank v. I.R.S., 770 F. 2d 1001, 1009 (11th Cir. 1985).

The Michigan Court of Appeals ruling is inconsistent with congressional intent as expressed in 26 U.S.C. 7425. Section 7425 expressly provides that failure to give written notice to the Internal Revenue Service means a foreclosure sale is held subject to the Federal lien. The holder of the Michigan Court of Appeals effectively nullifies the "subject to" provisions of section 7425. The effect of holding that the intent of the mortgage determines whether his mortgage lien is extinguished via foreclosure sale is that a foreclosure sale in Michigan cannot be held subject to a federal tax lien. A Michigan foreclosure sale connot be "subject to" because there are no conceivable facts upon which a mortgagee's subjective

intent will be to merge the lien with the fee.

The Michigan Court of Appeals should have held that Respondent's foreclosure sale extinguished his mortgage lien. Such a holding would be consistent with Section 7425. "...the nonjudicial foreclosuresale by Plaintiff saisfied and cancelled its mortgage against the subject property."

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subject to a federal tax lien. A Michigan foreclosure sale cannot be held "subject to" because there are no conceivable facts upon which a mortgagee's subjective intent will be to merge the lien with the fee.

The Michigan Court of Appeals should have held that Respondent's foreclosure sale extinguished his mortgage lien. Such a holding would be consistent with Section 7425. "...the nonjudicial foreclosure sale by Plaintiff satisfied and cancelled its mortgage against the subject property." Baldwin County Savings & Loan v. U.S., 81-2 USTC Paragraph 9619, 88,062 at 88,065 (1981). The effect of cancellation of the mortgage lien is to raise the federal tax lien to first priority status. " ...the government's tax lien was raised to first priority when WCDA foreclosed on its mortgage but failed to notify the Internal Revenue Service. Any inequitable result which this procedure creates is outweighed by the strong

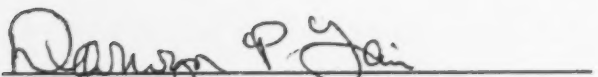
federal purposes which collection taxes serves to the national interest." Title Guaranty of Wyoming v. I.R.S., 667 F. Supp. 767 (D. 1987). "...the failure of the mortgages to comply with the notice provisions of 26 U.S.C. 7425 before they conducted the foreclosure sales and purchased the property, caused their mortgage liens to be extinguished and the federal liens to be elevated from their junior status." Southern Bank of Lauderdale County v. I.R.S., 770 F.2d 1001, 1009 (1985).

Petitioners believe that Section 7425 requires a holding that Respondent mortgage was extinguished by Respondent's foreclosure sale. In addition, a correct decision would hold that the federal tax lien was raised to first priority. Therefore, Petitioners purchased title at the tax sale free and clear of any interest or encumbrance held by Respondent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



DARWYN P. FAIR (P31266)
Attorney for Petitioners

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

MARCIA COUNCIL, being first duly sworn, deposes and says that on the 19th day of June, 1991, she mailed Forty (40) copies of Appellant's Brief, to the Clerk, U.S. Supreme Court, Washington, D.C. 20543, by enclosing same in a Federal Express envelope to the clerk at the aforementioned address and depositing said envelope in the Federal Express receptacle and mailing three (3) copies to Mr. Stephen Boak, 711 West Ann Arbor Trail, Plymouth, Michigan 48170 by

placing same in the United States Mail with postage fully prepaid.

Marcia Council

MARCIA COUNCIL

Subscribed and sworn to before me
this 19th day of June, 1991

Volante Council-Fair

VOLANTE COUNCIL-FAIR, Notary Public
Wayne County, Michigan
My Commission Expires: 4/18

STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH BYERLEIN,
as successor in interest to her late husband, ARTHUR BYERLEIN (Deceased),

Plaintiff-Appellee,

v.

EDDIE SHIPP AND GWENDOLYN BRANTLEY-SHIPP,

Defendants-Appellants.

January 17, 1990
For Publication
No. 110213
On Rehearing

Before: Cynar, P.J., and Gribbs and Marilyn Kelly, JJ.

PER CURIAM.

Plaintiff brought suit to quiet title on a parcel of property for which plaintiff holds a judicial deed and defendants hold a subsequent United Stated tax deed. The circuit court granted summary disposition to plaintiff and entered an order voiding the tax deed and declaring plaintiff the owner of the subject property in fee

simple. Defendants appeal as of right. We reverse and remand.

On February 4, 1970, plaintiff's late husband, Arthur Byerlein, held a recorded first mortgage on a parcel of property owned by Theodore and Celestine Graham. Between April 4, 1979 and May 16, 1985 , the IRS filed and recorded several federal tax liens against the Graham's interest in the subject property.

In June, 1983, plaintiff sued to foreclose, not joining the IRS as a party and also failing to give the IRS actual notice of the foreclosure proceeding. On June 11, 1984, a judgment of foreclosure was entered in plaintiff's favor. The foreclosure sale followed on November 20, 1984, at which time plaintiff purchased the property for an amount slightly more than their lien interest. Plaintiff received a judicial deed which was recorded on November

27, 1984, and subject to a six-month redemption period. The property was not redeemed and title vested in the plaintiff on May 20, 1985.

On June 24, 1985, the IRS gave notice of a public auction, offering for sale the interest of the Grahams in the subject property. Plaintiff received written notice of the auction from the IRS by mail a evidenced by a copy of said notice attached to plaintiff's complaint in the present action. The auction was held on July 22, 1985 and defendants purchased the interest in the property and received a tax deed.

On July 6, 1987, plaintiff sued to quiet title, and subsequently moved for summary disposition. A hearing was held on March 25, 1988, and plaintiff's motion was granted. At that time the circuit court signed the motion praecipe. However,

plaintiff apparently felt that a more detailed order was necessary, and filed a propos i written order under the seven day rule. Defendants responded with objections, claiming that plaintiff's proposed order went beyond the court's original decision. On May 20, 1988, plaintiff filed her motion for entry of judgment. Argument on the motion was heard on June 10, 1988, and the circuit court entered a written order on June 20, 1988, expressly declaring defendants' tax deed void and recognizing plaintiff as owner in fee simple. On July 11, 1988, defendants filed the present appeal.

As a threshold matter, plaintiff argues that this Court lacks jurisdiction due to defendants' failure to timely file their appeal. However, the record indicates that the circuit court entered its written order on June 20, 1988, and defendants filed their

claim on appeal on July 11, within the 21-day limitation for filing an appeal of right on a civil action. MCR 7.204. Though plaintiff argues the date of filing of the motion praecipe, March 25, 1988, is determinative, it is apparent from the record that there was a good deal of confusion and disagreement among the parties, including plaintiff, concerning the precise scope of the trial court's original decision. Under the circumstances, and given plaintiff's own conduct below, we can only conclude that the June 20, 1988 written order constitutes the final judgment of the trial court for purposes of this appeal. MCR 7.203(A).

With respect to defendants' contention that the circuit court erred as a matter of law when it set aside defendants' tax deed, we must agree. Defendants argue correctly that the U.S. tax liens had not been

extinguished following the foreclosure sale through which plaintiff had taken title.

Under Michigan law, a purchaser at a judicial sale takes the property subject to all prior defects, liens and encumbrances of which he has notice or of which he could obtain knowledge under his duty to inform himself. Janower v. Sibley Lumber Co, 245 Mich 571, 573; 222 NW2d 736i (1929).

Discharge of federal tax liens is governed by federal law, except to the extent that federal law makes state law controlling. Berlin v. United States, 535 F Supp 298 (DC NY, 1982). "Matters directly affecting the nature or operation [of federal tax liens] are federal questions, regardless of whether the federal statutory scheme specifically deals with them or not." United States v Brosnan, 363 US 237, 240; 80 S Ct. 1108, 1110; 4 L Ed 2d 1192 (1960). See also, Southern

Bank of Lauderdale County v United States, 770 F 2d 1001 (11th Cir. 1985).

The Federal Tax Lien Act, 26 USC 7425,was intended to protect the United States where its tax lien is junior, from its discharge under state law without prior notice to the United States of proceedings by which the property is sold. Myers v United States, 647 F2d 591 (CA5, 1981).

26 USC 7425 states in pertinent part:

> (a) Judicial proceedings. - If the United States is not joined as a party, a judgment in any civil action or suit described in subsection (a) of section 2410 of title 28 of the United States Code, or a judicial sale pursuant to such a judgment, with respect to property on which the United States has or claims a lien under the provisions of this title-
>
> (1) shall be made subject to and without disturbing the lien of the United States, if notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced,

> If a judicial sale of property pursuant to a judgment in any civil action or suit to which the United States is not a party discharges a lien of the United States arising under the provisions of this title, the United States may claim, with the same priority as its lien had against the property sold, the proceeds (exclusive of costs) of such sale at any time before the distribution of such proceeds is ordered.

While plaintiff argues that subsection (b) of the statute is also applicable to this action, that subsection, by its express terms, applies only to nonjudicial proceedings. Section 7425(a) makes clear that foreclosure and sale pursuant to judicial will discharge an inferior federal tax lien only if the United States is named as a party to the judicial foreclosure proceeding, the federal tax lien is not filed in accordance with the provisions of local laws at the time that foreclosure proceedings are commenced, or the law makes no provision for the filing of such liens. Myers, supra.

Since the IRS had properly filed notice of its tax liens prior to plaintiff's initiation of judicial foreclosure proceedings, and since plaintiffs failed to give the IRS notice or join them as a party to those proceedings, plaintiffs took title through the judicial deed subject to the perfected tax liens and the possibility of foreclosure on the basis of those liens. As noted by the Myers court:

> Under 6331 the United States is authorized to collect delinquent taxes "by levy upon all property...on which there is a lien provided in this chapter for the payment of such tax." 26 U.S.S 6331(1). The term "levy" as used in this Act includes "the power of distraint and seizure by any means." 26 U.S.C. 6331(b). And, here levy is proper, the United States may seize and sell the property levied upon. Id. Such levy and seizure need not be accomplished while the property is in the hands of the taxpayer; so long as the property is subject to a valid federal tax lien, it may be seized in the hand of any subsequent purchaser. Treas. Reg. 301.6331-1(a)(1) (1979); Mertens, Code Commentary, supra, 6331.1; W Plumb & L.

> Wright, Federal Tax Liens 201 (2d ed. 1969). [footnote omitted, emphasis added] 647 F2d at 601.

In addition, the record indicates that plaintiff received notice of the IRS public auction, pursuant to 26 USC 6335, but failed to either bid at the auction, or redeem the property either before the auction for the amount of the taxes owed plus expenses if any, as provided under 26 USC 6337(a), or within 180 days after the auction for the amount of the purchase price plus interest, as provided under 26 USC 6337(b). Furthermore, plaintiff did not claim any irregularity or impropriety in the IRS foreclosure proceedings.

However, though we are unable to conclude that plaintiff is entitled to summary disposition quieting title, neither can we conclude conversely that defendants are entitled to judgment quieting title.

While plaintiff's deed fails, her mortgage lien may yet survive.

A purchaser at a tax auction takes title to the property subject to any liens with priority over the federal tax liens, Streule v Gulf Finance Corp, 265 A 2d 298 (D.C. App 1970); see also, 26 USC 6339 (certificate of sale discharges all junior encumbrances). Thus, the question now becomes whether plaintiff's mortgage lien, which was senior to the IRS tax liens, survived the plaintiff's foreclosure and purchase of the property; or whether plaintiff's purchase of the mortgaged property caused a merger of the mortgage lien and fee estate, thereby extinguishing the mortgage lien.

> As stated in United States v State of Colorado, 872 F2d 338-339-340 (10th Cir 1989):
>
> Federal law governs the priority of a tax lien against other claims to property. Aquilino v United States, 363 US 509, 513-14, 80 S Ct 1277, 1280-

81, 4 L Ed 2d 1365 __US__, 108 S Ct 1762, 100 L Ed 2d 222 (1988); see IRC ss 6321-6323. Unless Congress has s tated otherwise, however, we look to state law in determining what constitutes a property interest or right to property to which a federal tax lien may attach. United States v Brosnan, 363 US 237, 240-42, 80 S Ct 1108, 1110-12, 4 L Ed 2d 1192 (1960); see Bigheart Pipeline Corp v United States, 835 F 2d 766, 767 (10th Cir 1987). Accordingly, whether merger applies in this case must be answered by reference to state law. See First American Title Ins Co v United States, 848 F 2d 969, 971 (9th Cir 1988) (applying California law of merger); United States v Polk, 822 F 2d 871, 874 (9th Cir 1987) (applying Arizona law of merger); Southern Bank v IRS, 770 F 2d 1001, 1007 (11th Cir 1985) (applying Alabama law of merger), cert denied, 476 US 1169, 106 S Ct 2890, 90 L Ed 2d 977 (1986). [emphasis added, footnote omitted]

In First American Title Insurance Co v United States, 848 F 2d 969, 971 (9th Cir 1988), the ninth circuit court of appeals determined that:

> Under California law, the general rule is that a mortgagee's lien is extinguished when the mortgagee purchases the property to which his or her lien was attached.

* * *

> The theory is that the mortgagee's lesser interest (the lien) has "merged" into the greater interest (the fee).
>
> [However,] California law recognizes an equitable exception to the rule: 'Equity will prevent or permit a merger as will best serve the purposes of justice and the actual and just intent of the parties...In the absence of an expression of intention, if the interest of the person in whom the several estates have united, as shown from all the circumstances, would be best subserved by keeping them separate, the intent to do so will ordinarily be implied.' [citations omitted]

The Court also noted:

> Granting equitable relief to [plaintiff mortgagee would not undermine congress's intent. If [plaintiff's] lien survives the sale, the government's junior liens still are unaffected by and the government can protect its interest in having a fair sale in the future when [plaintiff] sells the property or when the government forecloses on it. Granting equitable relief.also will not discourage senior lienors such as [plaintiff] from notifying the government of future sales. Senior lienors have a strong incentive to notify the government because doing so will extinguish the government's junior liens when the

property is sold. See 26 USC s 7425 (b)(2) and Sohn v California Pacific Title Ins Co, 124 Cal App 2d 757, 26i9 P 2d 223, 230 (1954). If notice is not given, the government's liens survive the sale, leaving an encumbrance on the property. We believe that this is the penalty that Congress intended to impose on senior lienors such as [plaintiff]. 848 F2d at 972-973.

In Michigan, the equitable rule regarding merger is much the same as that in California:

> There is no doubt about the general rule that when the holder of a real estate mortgage becomes the owner of the fee, the former estate is merged in the latter. This rule is, however, subject to the exception that when it is to the interest of the mortgagee and is his intention to keep the mortgage alive, there is no merger, unless the rights of the mortgagor or third persons are affected thereby. Anderson v Thompson, 225 Mich 155, 159 195 NW i689 (1923).

Further:

> The intention is controlling. It is either expressed or is implied from the circumstances of the transaction. If it is to the interest of the mortgagee to keep the mortgage alive, the intention to do so will be implied; for it is presumed that a man intends to do that which is to his advantage. But if the intention to merge the estates is expressed, the fact that it

> is to this benefit to keep the mortgage alive is immaterial. First National Bank of Utica v Ramm, 256 Mich 573, 575; 240 NW 2d 32 (1932).

See also, Vollmer v Coenis, 309 Mich 319, 324; 15 NW2d 654 (1944); Clark v The Federal Land Bank of Saint Paul, 167 Mich App 439, 444; 423 NW2d 220 (1987); Sylvania Savings Bank v Turner, 27 Mich App 640, 644-645; 183 NW2d 894 (1970).

Quite obviously it is in plaintiff's best interest to keep her mortgage lien alive, and her intent to do so will be implied absent an expressed intent to the contrary. As is often the case, a mortgagee at a foreclosure sale will purchase the property to prevent the property from being purchased by another party at below market value or below the amount of the lien. As noted by the tenth circuit in United States v State of Colorado, supra, at 340, it would be absurd for a mortgagee in such a circumstance to destroy her senior lien,

which would only benefit junior lienholders, and thereby preclude collection on the debt owed her.

Furthermore, the rights of defendants would not be prejudiced by a finding that plaintiff's mortgage lien survived. As noted previously, and indeed as expressly stated in the IRS Notice of Public Auction Sale, the purchaser takes title "subject to any prior valid outstanding mortgages, encumbrances, or other liens in favor of third parties against the taxpayer that are superior to the lien of the United States."

Therefore, we remand this case to the trial court for a finding of fact as to whether from the circumstances of the November 20, 1984 foreclosure sale plaintiff expressly intended that her mortgage lien would merge with the fee. If the court finds that such an expressed intent existed, the court shall enter judgment quieting

title in defendants. If, on the other hand, the court finds that no such expressed intent existed, then defendants take title subject to plaintiff's lien on the property and any remedies under the law plaintiff may have as a senior lienholder.

Reversed and remanded. We do not retain jurisdiction.

/s/ Walter P. Cynar
/s/ Roman S. Gribbs
/s/ Marilyn Kelly

STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH BYERLEIN, as successor in interest to her late husband, ARTHUR BYERLEIN (Deceased),

Plaintiff-Appellee,

v

EDDIE SHIPP AND GWENDOLYN BRANTLEY SHIPP,

Defendants-Appellants.

August 14, 1989

No. 110213

Before: Cynar, P.J., and Gribbs and Marilyn Kelly, JJ.

PER CURIAM.

Plaintiff brought suit to quiet title on a parcel of property for which plaintiff holds a judicial deed and defendants hold a subsequent United States tax deed. The circuit court granted summary disposition to plaintiff and entered an order voiding the tax deed and declaring plaintiff the owner of the subject property in fee simple. Defendants appeals as of right arguing that the trial

court erred by failing to recognize that the U.S. tax lien had not been extinguished following the foreclosure sale through which plaintiff had taken title. Moreover, defendants maintain that following the foreclosure sale, the Internal Revenue Service obtained senior lienholder status and, therefore, the tax deed received by defendants subsumed any interest plaintiff obtained through her judicial deed. We agree, and reverse and remand.

On February 4, 1970, plaintiff's late husband, Arthur Byerlein, held a recorded first mortgage on a parcel of property owned by Theodore and Celestine Graham. Between April 4, 1979 and May 16, 1985, the IRS filed and recorded several federal tax liens against the Grahams' interest in the subject property.

In June, 1983, plaintiff sued to foreclose, not joining the IRS as a party

and also failing to give the IRS actual notice of the foreclosure proceeding. On June 11, 1984, a judgment of foreclosure was entered in plaintiff's favor. The foreclosure sale followed on November 20, 1984, at which time plaintiff purchased the property for an amount equivalent to their lien interest. Plaintiff received a judicial deed which was recorded on November 27, 1984, and subject to a six-month redemption period. The property was not redeemed and title vested in the plaintiff on May 20, 1985.

On June 24, 1985, the IRS gave notice of a public auction, offering for sale the interest of the Grahams in the subject property. The auction was held on July 22, 1985 and defendants purchased the interest in the property and received a tax deed.

On July 6, 1987, plaintiff sued to quiet title, and subsequently moved for summary disposition. A hearing was held on March 25, 1988, and plaintiff's motion was granted. The circuit court entered its order on June 20, 1988, declaring defendant's tax deed void and recognizing plaintiff as owner in fee simple. On July 11, 1988, defendants filed the present appeal.

As a threshold matter, plaintiff's argument that this Court lacks jurisdiction due to defendants' failure to timely file this appeal, is without merit. The circuit court entered its order on June 20, 1988, and defendants filed their claim of appeal on July 11, within the 21-day limitation for filing an appeal of right on a civil action. MCR 7.204. However, plaintiff argues the date of the court's opinion, March 25, 1988, is determinative. In

order for an oral pronouncement to become binding as a judgment, the terms of the judgment must be read into the record and the court must declare that such statement is to be given immediate effect as a judgment without any further action or signing of a written judgment. Tiedman v Tiedman, 400 Mich 571, 576-577; 255 NW2d 632 (1977). In this case, there was no such unequivocal intent expressed by the court that its opinion was to become immediately effective as a judgment.

With respect to defendants' contention that the circuit court erred as a matter of law when it set aside defendants' tax deed, we must agree.

Under Michigan law, a purchaser at a judicial sale takes the property subject to all prior defects, liens and encumbrances of which he has notice or of which he could obtain knowledge under his duty to inform

himself. Janower v. F M Sibley Lumber Co, 245 Mich 571, 573; 222 NW2d 736 (1929).

Discharge of federal tax liens is governed by federal law, except to the extent that federal law makes state law controlling. Berlin v United States, 535 F Supp 298 (DC NY, 1982). Further, federal law has been held to control the priority of federal tax liens after a senior mortgagee has foreclosed on property without giving notice to the IRS, and then purchased the property. Title Guaranty Co of Wyoming, Inc v IRS, U S Dep't of Treasury, 667 F Supp 767 (D Wyo, 1987).

The Federal Tax Lien Act, 26 USC 7425, was intended to protect the United States where its tax lien is junior, from its discharge under state law without prior notice to the United States of proceedings by which the property is sold. Myers v United States, 647 F2d 591 (CA5, 1981).

26 USC 7425 states in pertinent part:

(a) Judicial proceedings. - If the United States is not joined as a party, a judgment in any civil action or suit described in subsection (a) of section 2410 of title 28 of the United States Code, or a judicial sale pursuant to such a judgment, with respect to property on which the United States has or claims a lien under the provisions of this title-

(1) shall be made subject to and without disturbing the lien of the United States, if notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced,

* * *

If a judicial sale of property pursuant to a judgment in any civil action or suit to which the United States is not a party discharges a lien of the United States arising under the provisions of this title, the United States may claim, with the same priority as its lien had against the property sold, the proceeds (exclusive of costs) of such sale at any time before the distribution of such proceeds is ordered.

While plaintiff argues that subsection (b) of the statute is also applicable to this action, that subsection, by its

express terms, applies only to nonjudicial proceedings. Section 7425(a) makes clear that foreclosure and sale pursuant to judicial will discharge an inferior federal tax lien only if the United States is named as a party to the judicial foreclosure proceeding, the federal tax lien is not filed in accordance with the provisions of local laws at the time the foreclosure proceedings are commenced, or the law makes no provision for the filing of such liens. Myers, supra.

Since the IRS had properly filed notice of its tax liens prior to plaintiff's initiation of judicial foreclosure proceedings, and since plaintiffs failed to give the IRS notice or join them as a party to those proceedings, plaintiffs took title through the judicial deed subject to the perfected tax liens and the possibility of foreclosure on the basis of those liens.

Moreover, the IRS's junior lien was raised to first priority when plaintiff's first foreclosed on the mortgage without notifying the IRS. Title Guaranty, supra.

On a final note, the record indicates that plaintiff was notified of the IRS public auction but failed to either bid at the auction, or redeem the property afterwards. Furthermore, plaintiff did not claim any irregularity or impropriety in the IRS foreclosure proceedings. Under the circumstances of this case, it is defendants, rather than plaintiff, who are entitled to summary disposition quieting title.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ Walter P. Cynar
/s/ Roman S. Gribbs
/s/ Marilyn Kelly

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

ELIZABETH BYERLEIN, as Successor in the interest to her late husband ARTHUR BYERLEIN,

Plaintiff,

vs.

EDDIE SHIPP and GWENDOLYN BRANTLEY SHIPP, jointly and severally,

Defendants.

JUDGE THOMAS A. BRENNAN
P11173
C.A. NO. 87-716,335-CH

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ORDER GRANTING MOTION FOR SUMMARY DISPOSITION QUIETING TITLE IN PLAINTIFF

At a session of said Court held in the Courtroom thereof, City County Building, Detroit, Michigan, County of Wayne, State of Michigan on June 20, 1988

PRESENT
HONORABLE Hon. Thomas J. Brennan
CIRCUIT JUDGE

This matter having come before the Court on Plaintiff's Motion For Summary Disposition, the Court having reviewed the pleadings, the parties having submitted briefs and oral argument, and the Court having duly considered the same and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that Plaintiff's Motion For Summary Disposition be and is hereby granted.

IT IS ORDERED AND ADJUDGED that the deed of conveyance from the District Director of Internal Revenue, Detroit, Michigan to Gwendolyn Brantley, and bearing the date of March 6, 1986, of the following described land and premises

located in the City of Detroit, County of Wayne, State of Michigan:

> Lot 94, Palmer Woods, being a subdivision of part of Southwest 1/4 Section 2 and part of Southeast 1/4 Section 3, Town 1 South, Range 11 East, lying West of Woodward Avenue, Greenfield Township, Wayne County, Michigan, according to the Plat thereof as recorded in Liber 32, Page 16 of Plats, Wayne County Records. (more commonly known as 19500 Cumberland)

and recorded in the Office of the Register of Deeds for the County of Wayne, in Liber 22923 of deeds at Page 391, be, and the same is hereby set aside, vacated and declared null and void as against Elizabeth Byerlein, her heirs and assigns as a cloud upon the title of Plaintiff and that Defendants, EDDIE SHIPP and GWENDOLYN BRANTLEY SHIPP, deliver up the deed to be cancelled by the Clerk of the Court.

IT IS FURTHER ORDERED that Plaintiff is the owner of the land and premises in fee

simple by a title, perfect as against Defendants in this suit.

IT IS FURTHER ORDERED that Plaintiff have leave to cause this Order, or a certified copy thereof, to be recorded in the Office of the Register of Deeds for the County of Wayne.

Hon Thomas J. Brennan
CIRCUIT COURT JUDGE

Court of Appeals, State of Michigan

ORDER

Elizabeth Byerlein v. Eddie Shipp

Walter P. Cynar
Presiding Judge
Roman S. Gribbs
Marilyn Kelly
Judges

Docket# 110213

L.C.# 87 716334 CH

The Court orders that the motion for rehearing is GRANTED.

A true copy entered and certified by Norbert G. Jaworski, Chief Clerk, on January 17, 1990.

MICHIGAN SUPREME COURT

Order
Entered: July 31, 1990

Lansing, Michigan

88335
88335(44)

ELIZABETH BYERLEIN, as Successor
in interest to her late husband,
ARTHUR BYERLEIN,

Plaintiff-Appellee,
Cross-Appellant,

v

SC: 88335
COA: 110213
LC: 87-716334-CH

EDDIE SHIPP and
GWENDOLYN BRANTLEY SHIPP,
jointly and severally,

Defendants-Appellants,
Cross-Appellees.

On order to the court, the applications for leave to appeal and for leave to appeal as cross-appellant are considered and they are DENIED, because we are not persuaded that the questions presented should now be reviewed by this Court.

70724

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court. July 13, 1990, Jacqueline B. MacKinnon, Deputy Clerk